

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRELL DONALD FERGUSON,

Defendant and Appellant.

D053401

(Super. Ct. No. SCD211943)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia A. Bashant, Judge. Affirmed.

Tyrell Donald Ferguson pleaded guilty to burglary (Pen. Code,<sup>1</sup> § 459), petty theft with a prior (§§ 484, 666), and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Ferguson admitted allegations that he was convicted two or more times within the meaning of section 1203, subdivision (e)(4), and had two prior prison term convictions (§§ 667.5, subd. (b), 668) as well as a prior strike: a 1982 robbery conviction (§§ 667, subds. (b)-(i), 668, 1170.12). The court denied Ferguson's motion to

---

<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

dismiss his strike prior conviction and sentenced him to a six-year term, consisting of the middle term of two years doubled because of the strike and two one-year enhancements for the two prior prison terms.

On appeal, Ferguson contends the court abused its discretion when it declined to strike his prior strike conviction because other factors mitigated his offenses. We affirm the judgment.

## FACTS

On February 16, 2008, a police officer responded to a report of theft at a Sam's Club in San Diego County. The general manager of the store observed the man, later identified as Ferguson, place six bottles of liquor in a shopping basket. The general manager watched Ferguson move to a different location in the store where Ferguson transferred the liquor from the shopping basket into a nylon shopping bag. Ferguson then bypassed the store cash registers and left without paying for the liquor.

The general manager stopped Ferguson outside the store and asked him to return inside. Ferguson was taken to a back office and the police were called. The officer who responded to the call searched Ferguson and found a small plastic bag containing a granular substance that was later determined to be 0.03 grams of methamphetamine. The officer also found a credit card and two access cards to different locations, none of which had Ferguson's name on them.

## DISCUSSION

### I. *Legal Principles/Standard of Review*

Section 1385, subdivision (a) provides in part that a trial court "may, either of [its] own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." That provision permits a court to strike prior felony conviction allegations in cases brought under the "Three Strikes" law. (*People v. Superior Ct. (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*).) However, a "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385[, subdivision] (a), and is subject to review for abuse." (*Id.* at p. 530; *People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*); *In re Large* (2007) 41 Cal.4th 538, 550.)

In reviewing for abuse of discretion, we are guided by two principles. First, " 'the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.' " (*Carmony, supra*, 33 Cal.4th at pp. 376-377.) Without this showing, the trial court " 'is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside upon review.' " [Citations.] Second, a " 'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " " (*Ibid.*) Thus, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it" or if " 'the

sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious, or patently absurd" result' under the specific facts of a particular case." (*Id.* at pp. 377, 378.) " 'Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Id.* at p. 378.)

To determine whether to strike an allegation "in furtherance of justice," the court must balance "the constitutional rights of the defendant, and the interests of society represented by the People." (*Romero, supra*, 13 Cal.4th at pp. 530-531, italics omitted.) "[A] court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the [T]hree [S]trikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' " (*Ibid.*) In deciding whether to dismiss a strike prior " 'in furtherance of justice . . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of

one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); see also *In re Large, supra*, 41 Cal.4th at p. 552.)

## II. *The Trial Court Did Not Abuse Its Discretion in Declining to Dismiss Ferguson's Strike*

Ferguson contends the court improperly denied his motion to strike his strike prior conviction — a 1982 robbery — given what he asserts are the mitigating factors of his remorse and early acknowledgement of culpability, the fact the crimes he committed after his strike prior were of decreasing seriousness, and his drug addiction. The contention requires us to assess whether the court abused its discretion in balancing "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of [the defendant's] background, character, and prospects." (*Williams, supra*, 17 Cal.4th at p. 161.) As we shall explain, the trial court engaged in a proper and reasonable analysis, and Ferguson has not shown its decision was arbitrary or capricious or that its result was absurd given the facts of the case.

First, the court considered Ferguson's expression of remorse and admission of culpability when it chose to impose the midterm doubled instead of imposing an aggravated term. However, it then weighed Ferguson's remorse and willingness to admit culpability against his "bad record" that included "continuous criminal contact from the time Mr. Ferguson was 17 years old." The court noted that Ferguson had been "placed on probation numerous times unsuccessfully. [He had] been on parole a couple of times unsuccessfully." Finally, the court balanced Ferguson's rights with the rights of the public and stated that "there comes a time when [] it becomes important not only to try

and give rehabilitation to Mr. Ferguson but protect the public, I don't feel at this point the public can be protected from Mr. Ferguson because every time he gets out he commits another burglary." To the extent Ferguson suggests that the court did not weigh his remorsefulness as a mitigating factor or give that factor adequate weight, the argument is without merit.

Ferguson further argues that the decreasing severity of his crimes after his 1982 felony warrants striking his prior robbery conviction. He relies, in part, on language in *People v. Bishop* (1997) 56 Cal.App.4th 1245, for the proposition that the "nature and timing of a defendant's crimes may also operate as mitigation." (*Id.* at p. 1251.) However, *Bishop* also states that "once a defendant has qualified for three strikes sentencing, the number of his prior convictions operates as a factor in aggravation, as may the nature of his prior and present crimes and the timing with which they were committed." (*Id.* at pp. 1250-1251.) As the trial court observed, Ferguson has a lengthy criminal record dating back to 1981, when he was a minor. Since his strike conviction in 1982, he was charged and convicted of, among other crimes, grand theft (1986 and 1988), possession of controlled substances (1988 and 2001), burglary (1989, 1992, 1996, 2001), and battery on a cohabitant/spouse (2000). He has had his probation revoked numerous times. Considering Ferguson's lengthy, continuous criminal record and unsuccessful parole performance, we do not perceive a decrease in criminality or decreasing severity to warrant an exception for Ferguson under the Three Strikes law.

Ferguson's primary assertion is that his drug use mitigates his offenses. He acknowledges case law emphasizing that long-term addiction does not mitigate, and may even aggravate, culpability, but then seeks to distinguish his situation. In part, he asserts the other cases "involve defendants who — unlike appellant — are unwilling to pursue treatment . . . or who have 'participated in numerous rehabilitation programs without indicating any commitment or positive results therefrom.' " He claims nothing indicates he is unwilling or unable to address the substance abuse problems that "have plagued his life and hampered his previous efforts at rehabilitation."

We are not persuaded. "[D]rug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) Ferguson's attorney noted that although Ferguson "has had . . . opportunities to do a program, he has never really done a program." The record indicates that Ferguson briefly participated in a drug rehabilitation program while incarcerated, but the record is devoid of any indication that Ferguson sought out or completed this program or any other drug rehabilitation programs on his own. Even if Ferguson did seek out that one instance of drug rehabilitation while incarcerated, the record fails to show that he attempted to "follow through in efforts to bring his substance abuse problem under control." (*Williams, supra*, 17 Cal.4th at p. 163.) The court acknowledged Ferguson's drug condition and balanced it against his lengthy criminal record and the need to protect the

public. It determined that his situation did not warrant striking the strike. This decision was not arbitrary or irrational.

Ferguson "finds himself in the difficult position of having to rebut the 'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large, supra*, 41 Cal.4th at p. 551, quoting *Carmony, supra*, 33 Cal.4th at p. 378.) Based on the evidence in the record and the court's careful balancing of the various factors in light of such evidence, we conclude the court did not abuse its discretion in refusing to strike Ferguson's strike prior conviction.

### III. *Correction of Abstract of Judgment*

We note that the abstract of judgment inaccurately refers to Penal Code section 457 as the underlying statute on Ferguson's count one burglary conviction. The abstract should be amended to reflect that the conviction is under Penal Code section 459.



## DISPOSITION

The judgment is affirmed. The trial court is directed to amend Ferguson's abstract of judgment to reflect that his count one burglary conviction is under Penal Code section 459, and forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

---

O'ROURKE, J.

WE CONCUR:

---

HUFFMAN, Acting P. J.

---

McINTYRE, J.